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**CONSTITUTIONAL
ASSEMBLY**

**CONSTITUTIONAL COMMITTEE
SUB-COMMITTEE**

SUBMISSIONS

**RECEIVED AS AT
14TH FEBRUARY 1996**

VOLUME 15

PART 1

***GOVERNMENT INSTITUTIONS
ORGANISATIONS***

CONSTITUTIONAL ASSEMBLY

SUMMARY OF SUBMISSIONS RECEIVED AS AT 14th FEBRUARY 1996

VOL 15	ORGANISATION	SUBJECT	SUMMARY
15.1	Centre for Conflict Resolution: L Nathan	Security Services	<p>Amend Section 174 to ensure greater clarity:</p> <p>1. Governing principles</p> <p>Security shall be based on the resolve of all South Africans, as individuals and as a nation, to live as equals, in peace and harmony, and free from fear and want.</p> <p>National security policy shall therefore encompass the consolidation of democracy; the pursuit of social justice, economic development and a safe and peaceful environment; and the maintenance of the political independence and territorial integrity of the Republic.</p> <p>The Executive and Parliament shall be responsible for the maintenance of peace and security.</p> <p>The functions of the security services shall be determined by legislation in accordance with the</p>

Centre for Conflict
Resolution (cont.)

Constitution.

2. Deployment of the defence force

Articles 82(4)(b)(ii), 228(4)(a) and 228(5) of the Interim Constitution, which deal with the President's authority to deploy the SANDF and Parliament's right to review such deployment, have been deleted.

These are proper constitutional matters and should not be left to legislation. They convey a powerful message about the authority of the President and Parliament in respect of military deployment.

3. Political responsibility

Civilian control over the SANDF is undermined by the deletion of Article 228(2) of the Interim Constitution (which deals with parliamentary approval of the annual defence budget) and Article 82(4)(a) (which establishes that the President is the Commander-in-Chief of the armed forces).

4. Defensive orientation

Article 227(f) of the Interim Constitution should be retained: "The National Defence Force shall be primarily defensive in the exercise or performance of its powers and functions".

It could be argued that this provision is covered implicitly by the references to international law.

	Centre for Conflict Resolution (Cont.)		<p>There are two problems with this argument: there is insufficient understanding within government and the SANDF of the relevant law; and most countries do not in fact have defensive armed forces, despite their commitment to international law.</p> <p>It is therefore important to make <u>explicit</u> the defensive issue. The best wording would be: "The defence force shall have a defensive orientation and posture". This wording will be very important in the forthcoming Defence Review which may shape the nature of the SANDF for decades.</p>
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15.2	Fish Hoek Baptist Church	<p>Founding Provisions; Bill of Rights; Equality; Dignity; Life; Freedom and security; Religion; Children</p>	<p>Preamble Concerned about the omission of words: "In humble submission to Almighty God".</p> <p>Bill of Rights Omission: The Bill of Rights speaks to many individual rights, but nowhere does it balance those rights with individual responsibilities.</p> <p>Equality Clause 8.1 We strongly urge that the words "sexual orientation" be omitted from this clause.</p> <p>Clause 8.4 We recommend that clause 8(4) be modified to provide or any person who may believe that they have been unfairly discriminated against, on any of the grounds listed in 8(3), to have free access to legal representation.</p> <p>Human Dignity Clause 9: We request the amendment of clause 9 as indicated in italics: <i>"Everyone, irrespective of their degree of awareness, health or development has inherent dignity..."</i></p>
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<p>Fish Hoek Baptist Church (cont.)</p>		<p>Life Clause 10 Option 1 should be omitted in favour of Option 2;</p> <p>We request that Option 2 be amended by the inclusion of the words in italics: <i>Everyone, irrespective of their degree of awareness, health or development has the right to life...</i>"</p> <p>Freedom & Security Clause 11.3(c) We request that clause 11.3(c) be amended as follows: <i>"subjected to medical, scientific, psychological or other experiments or treatment without that person's informed consent."</i></p> <p>Freedom of religion, belief and opinion Clause 14.1 We request the amendment of Clause 14.1 by the addition of the words in italics: " ... including the right to freely change one's religion."</p> <p>Clause 14.2(a) We request that clause 14.2(a) be amended as follows: <i>"those observances follow rules made by the particular institution concerned."</i></p>
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15.2	Fish Hoek Baptist Church (cont.)		<p>Children Clause 27.1(f) We recommend that Clause 27.1(f) be reviewed.</p>
15.3	Ministry for General Services Fismer C (MP, Minister)	Legislative Authorities	<p>Propose amendment to Schedule 6. Section 126 of the Constitution <i>inter alia</i> provides that "(a) provincial legislature shall have concurrent competence with Parliament to make laws for the province with regard to all matters which fall within the functional areas specified in Schedule 6." [of the Constitution]. The second item in schedule 6 refers to "casinos, racing, gambling and wagering." I wish to propose that this be amended in the applicable schedule of the new constitutional text to read "<u>Casinos, racing, gambling and wagering, excluding lotteries and sports pools</u>".</p> <p>Gambling in general, including lotteries, was the subject of the Board's investigation. It concluded in its interim report of October 1994 at paragraph 3.0 (c) on page 9 that "(a) national state lottery should be owned and controlled by <i>central</i> Government." Government has the authority to legislate on lotteries and gambling in South Africa while Schedule 6 to the Constitution of the Republic of South Africa, 1993, (Act 200 of 1993), <i>excludes lotteries from the legislative competencies of the Provinces.</i>" In its main report of March 1995 on page 64 it argued that "(1) legislative competency with regard to lotteries is vested in <i>central</i> government.", (own emphasis in all three above quotes).</p>

15.4	Ministry for General Services (cont.)		<p>Sports pools represent a specific type of lottery and it is submitted that the same arguments advanced in respect of lotteries applies to sports pools as well.</p> <p>Section 156(1B) of the Constitution makes special provision for lotteries next to casinos, gambling and other games of chance. It can therefore be argued that had the Legislature intended to include lotteries i Schedule 6, it would expressly have stated so, as is the case in section 156(1B).</p> <p>It is desirable to expressly state the specific exclusion of lotteries and sports pools from the item in question. This is no way creates an untenable position, as other items of Schedule 6 have specific exclusions, such as education, local government and nature conservation.</p>
15.5	Muslim World League	Religion	<ol style="list-style-type: none"> 1. The requirements that the system of personal law must be subject to the bill of rights amounts to a gross violation of religious freedom itself. 2. The requirement must be deleted and the freedom of religion clause must be given overriding effect in order to avoid a conflict with other fundamental rights.

15.6	SA Federation for Mental Health	Equality	<p>The Federation applauds the rights given to persons with Mental Illness and Mental Handicap by implication in the draft constitution and agrees that in principle people should have to approach the courts if they require the rights of a person with an intellectual or psychiatric disability to be limited. This is probably unique for any country.</p> <p>Whereas we are all in favour of protecting the rights of people with mental illness and mental handicap, we are of the opinion that provision must be made for Administrative action in cases of urgency where people are in a real danger of causing physical or financial harm to themselves and others. At the same time such administrative action must have safeguards to prevent exploitation. Under the present legislation it has been possible to lock away mentally ill people or decades. That must never happen again.</p> <p>It is important that the Public Protector should not only have the power and capacity to investigate complaints, but that he should act pro-actively to ensure that persons with mental illness or mental handicap enjoy the human rights they are entitled to.</p>
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15.7	Society for the Abolition of the Death Penalty	Death Penalty	<p>Option 1 is in compliance with the constitutional principles set out in Schedule 4 to the interim Constitution which are also applicable to the final Constitution. It also complies with the principles of interpretation set out in Section 36 of the draft Constitution.</p> <p>Most importantly, it does not undermine the principles set out by the Constitutional Court in the case of <u>Themba Makwanyane and Mvuso Mchunu v The State</u> as does option 2.</p> <p>As Professor Hugh Corder has convincingly argued, Parliament should be reluctant to change the wording of the Constitution as pronounced upon by the Constitutional Court because such amendments inevitably undermine the authority and safeguards of the Constitution.</p> <p>Moreover, to quote Professor Devenish, the death penalty "creates an erroneous impression that effective measures are indeed being adopted to counteract crime, and very often the fundamental socio economic issues giving rise to criminal conduct are not addressed and remedied."</p> <p>Still more unacceptable is the fact that inevitably the death penalty tends to be carried out upon the most vulnerable members of society "the poor, the mentally disturbed and the members of racial, religious or ethnic minorities.</p>
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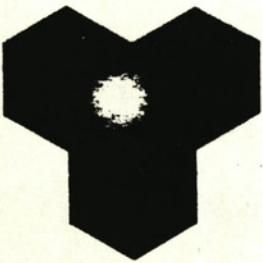
	Society for the Death Penalty (cont.)		Throughout the world it has applied disproportionately to the disadvantaged, and death sentences are imposed on people at the lower end of the social scale who would not have faced the death penalty if they had come from a more favoured section of society."
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15.8	University to Pretoria Prof PJH Titlestad	Language; Language and Culture	<p>Language Option 1 is clearly the most satisfactory; Option 3 is too brief, leaving out some desirable detail; Option 2, the unaltered clauses of the interim constitution, retain the weak features of these clauses. The weakness in the original section 3 of the interim constitution lies chiefly in the phrase "equal use and enjoyment" of 3(1) and 3(9)a. This is an unrealisable ideal, implying a totally impractical numerical concept which ignores the widely different numbers of speakers of different languages and ignores the question of language function: certain languages are used as <i>linguae francae</i> and not just by first-language or mother-tongue speakers.</p> <p>The language clauses of the constitution must leave room for flexibility, hence such phrases as "equal use" must be avoided.</p> <p>Language Culture It is proposed here that the original clauses 31 and 32 of the interim constitution be retained. The suggested redraft which conflates and condenses them into the single, brief Working Draft clause 30, is so wide as not to adequately confer rights or protect rights. The detail and specificity of the original clauses 31 and 32 is highly desirable. These clauses do contain the necessary qualification forbidding their racist application.</p>
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CONSTITUTIONAL ASSEMBLY

SUMMARY OF SUBMISSIONS RECEIVED AS AT 14th FEBRUARY 1996

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**CENTRE FOR
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96/108/jf

2 February 1996

Mr Cyril Ramaphosa
Constitutional Assembly
CAPE TOWN

Fax No. 24-1162

Dear Cyril

I have prepared for Jenny Shreiner some comments on the Chapter on Security Services in the Working Draft of the New Constitution of 22 November 1995. Ian Phillips suggested that I copy these to you.

The comments are based primarily on the fact that members of the SANDF rely heavily on the Constitution as a source of fundamental direction.

1. Governing principles

The provisions of Section 174 are extremely unclear and imprecise; the section does not deal with the state's responsibility in relation to security; and, by appearing under the heading 'Security Services', it creates the impression that these services are responsible for all aspects of security.

I would suggest the following wording:

Security shall be based on the resolve of all South Africans, as individuals and as a nation, to live as equals, in peace and harmony, and free from fear and want.

National security policy shall therefore encompass the consolidation of democracy; the pursuit of social justice, economic development and a safe and peaceful environment; and the maintenance of the political independence and territorial integrity of the Republic.

The Executive and Parliament shall be responsible for the maintenance of peace and security.

The functions of the security services shall be determined by legislation in accordance with the Constitution.

2. Deployment of the defence force

Articles 82(4)(b)(ii), 228(4)(a) and 228(5) of the Interim Constitution, which deal with the President's authority to deploy the SANDF and Parliament's right to review such deployment, have been deleted.

These are properly constitutional matters and should not be left to legislation. They convey a powerful message about the authority of the President and Parliament in respect of military deployment.

3. Political responsibility

Civilian control over the SANDF is undermined by the deletion of Article 228(2) of the Interim Constitution (which deals with parliamentary approval of the annual defence budget) and Article 82(4)(a) (which establishes that the President is the Commander-in-Chief of the armed forces).

4. Defensive orientation

Article 227(f) of the Interim Constitution should be retained: "The National Defence Force shall be primarily defensive in the exercise or performance of its powers and functions".

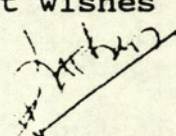
It could be argued that this provision is covered implicitly by the references to international law in the New Draft.

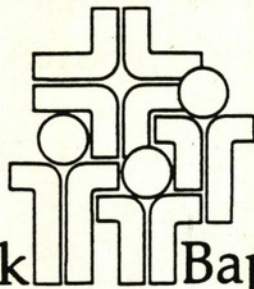
There are two problems with this argument: there is insufficient understanding within government and the SANDF of the relevant law; and most countries do not in fact have defensive armed forces, despite their commitment to international law.

It is therefore important to make explicit the defensive issue. The best wording would be: "The defence force shall have a defensive orientation and posture". This wording will be very important in the forthcoming Defence Review which may shape the nature of the SANDF for decades.

I hope that the above is helpful and makes sense.

Best wishes


LAURIE NATHAN
Executive Director



Fish Hoek Baptist Church

2nd Crescent Fish Hoek Tel 782-3215 Fax 782-6293 P.O. Box 22032 Fish Hoek 7975

06 February 1996

**THE EXECUTIVE DIRECTOR
CONSTITUTIONAL ASSEMBLY
P O Box 1192
CAPE TOWN
8000**

Dear Sir

RE: DRAFT CONSTITUTION FOR SOUTH AFRICA

We, the Fish Hoek Baptist Church, would like to make some comments on the new Constitution.

Enclosed is a copy of our views and recommendations which deal with the Preamble, the Founding Provision and the Bill of Rights.

We would urge you to take these into serious consideration in the writing of the final constitution.

Yours sincerely

A handwritten signature in black ink, appearing to read "John V Thomas". The signature is written in a cursive, slightly slanted style.

REV JOHN V THOMAS
SENIOR PASTOR : FISH HOEK BAPTIST CHURCH

Abbreviated submission of
critical items

Preamble

Omission

We note with concern that the current working draft does not yet reflect the wording of a preamble, as did the interim constitution. In particular, we are concerned that such an omission may also result in the omission of the following clause in the final constitution: "In humble submission to Almighty God"

concerned
on omission
words

Recommendation

That the Constitution be preceded by the words:

"In humble submission to Almighty God, in whose image we are created, we the people of South Africa declare that:

recognising the need to establish and guarantee the dignity of each person;

and

desiring to establish a country whose laws and social climate provide for and encourage the recognition of that dignity;

and

aware that no individual, society or nation can be whole and complete whose primary focus is on their own rights without a corresponding individual commitment to meeting the responsibilities which make those rights possible;

the following provisions are adopted as the Constitution of the Republic of South Africa."

Motivation

In a country where the overwhelming majority acknowledge an Almighty God, we believe it is imperative that this be embodied as the direction-giving foundation for the new constitution. Without this anchor, all subsequent statements are devoid of any absolute reference point, ultimate accountability or moral value.

To refer to "Almighty God" does not align the state to any particular religion; the term would be acceptable to over 90% of the population [Christians, Muslims, Jews and African Tribal/Traditional religions]; only a few "secular atheists" are likely to object - i.e. such a tenet would be a

democratic expression of an overwhelming majority.

The Nuremberg trials after World War 2 showed that there is a universally recognised need for "a law above the law" which gives it meaning. We submit that clauses such as clauses 9 and 10 of Chapter 2 [Bill of Rights, page 4] dealing with human dignity and the right to life have little meaning without this as a guiding principle. ["I was only doing my duty ..."]

Chapter 2: Bill of Rights

Omission

The Bill of Rights speaks of many individual rights, but nowhere does it balance those rights with individual responsibilities. The concept of individual rights needs to be understood and interpreted against a backdrop of basic values and governing principles. This device is used in Chapter 12 [Public Administration - paragraph 171] and the application of this device to the Bill of Rights in particular, and indeed to the Constitution as a whole, is requested.

Paragraph 39 of Chapter 2 [Interpretation of Bill of Rights] does begin to reference the concept of values [... "every court (a) must promote the values that underlie an open and democratic society based on freedom and equality; ... "] but leaves the basis of values extremely broadly defined. This submission, requests that the Constitution makes explicit reference to a set of core common values.

Motivation

"I have walked that long road to freedom. ... But I can rest for only a moment, for with freedom come responsibilities, and I dare not linger, for my long walk is not yet ended."
[Quoted from Nelson Mandela's autobiography: Long Walk to Freedom - page 617]

Comment on the working draft of the South African Constitution

Clause 8.1: Equality [page 4]

Amendment

We request the amendment of clause 8 (1) to read as follows:

"Everyone, irrespective of their degree of awareness, health or development is equal before the law ..."

Motivation

We believe that the word "everyone" needs to be defined, to clearly include anyone who might at any stage be considered by anyone to be less than human or of less value.

Clause 8.3: Equality [page 4]

Recommendation

We strongly urge that the words "sexual orientation" be omitted from this clause.

Motivation

Clause 8 (3) reflects several conditions of *immutable status*. A strange inclusion, however, is one that is not an immutable status, but rather a lifestyle or behaviour, carefully packaged to appear otherwise.

The inclusion of *sexual orientation* would give to the lifestyle of promiscuous homosexuality and the behaviour of sodomy - for many years a crime - not only acceptance, but *specified protection*. If it is naively felt that this is not what is being campaigned for, then even a cursory look at the Cape Town Lesbian and Gay Rights march and the banners they carried on 11 December 1995 should quickly dispel that illusion.

If the proposed constitution is setting out specifically to protect, not only immutable status but also certain lifestyles, then we are opening the door to a never-ending list of equally if not more worthy considerations such as alcoholics, smokers, drug addicts, vegetarians, meat eaters, kleptomaniacs, etc., etc., all of whom could expect, in fairness, also to receive special protection before the law and consequent recognition in society.

If the constitution intends to protect non-immutable status then it is absurd to choose one whose particular sexual activity [sodomy] is acknowledged to be the highest risk activity in the spread of AIDS and other sexually transmitted diseases. This is besides the fact that homosexuals consider quite normal a

degree of promiscuity that would be totally unacceptable to any heterosexual.

It is further incongruous that a constitution should give specific status and protection to a lifestyle and behaviour clearly condemned by the three great religions representing the majority of South Africans, namely: Islam, Judaism and Christianity.

If one had to protect a lifestyle, then we submit that the nuclear family or extended family would be a much more healthy and logical one to choose.

This Clause also invites people to claim constitutional protection for incest, rape and child sex, etc., on the basis that this is an expression on their sexual orientation.

Clause 8.4: Equality [page 4]

Recommendation

We recommend that clause 8(4) be modified to provide for any person who may believe that they have been unfairly discriminated against, on any of the grounds listed in 8 (3), to have free access to legal representation.

Motivation

Although the wording of Clause 8 (4) may appear to aid those unfairly discriminated against, it opens up the opportunity and potential for much unfounded and disruptive litigation and creates the implication of "guilty until proven innocent" by putting the onus on the accused to prove innocence, which is contrary to all civilised law and would cause serious repercussions in our society and judiciary.

Furthermore, it does not allow for instances and institutions which *by nature* need to be discriminatory, such as men's/women's organisations, or religious groups. Will a Muslim organisation be guilty of discrimination if it will only employ job applicants who hold to the Muslim faith?

Clause 9: Human Dignity [page 4]

Amendment

We request the amendment of clause 9 as indicated in italics:

"Everyone, irrespective of their degree of awareness, health or development has inherent dignity ..."

Comment on the working draft of the South African Constitution

Motivation

We believe that the word "everyone" needs to be defined, to clearly include anyone who might at any stage be considered by anyone to be less than human or of less value.

Clause 10: Life [page 4]

Recommendation

Option 1 should be omitted in favour of Option 2.

Motivation

All major religious teaching states clearly that one has no claim to rights which one has deliberately denied another.

Clause 10: Life [page 4]

Recommendation

We request that Option 2 be amended by the inclusion of the words in italics:

Everyone, *irrespective of their degree of awareness, health or development* has the right to life ..."

Motivation

We believe that the word "everyone" needs to be defined, to clearly include anyone who might at any stage be considered by anyone to be less than human or of less value.

Clause 11.3 (c): Freedom and security of the person [page 5]

Recommendation

We request that clause 11.3 (c) be amended as follows:

"subjected to medical, *scientific, psychological or other experiments or treatment without that person's informed consent.*"

Clause 14.1: Freedom of religion, belief and opinion [page 5]

Amendment

We request the amendment of Clause 14.1 by the addition of the words in italics:

"... *including the right to freely change one's religion.*"

Motivation

We are concerned that despite the claims to religious freedom in some countries, individuals are not permitted to change their religion, and that this specific point of

emphasis is a necessary requirement to clarify the meaning of religious freedom.

Clause 14.2 (a): Freedom of religion, belief and opinion [page 5]

Amendment

We request that clause 14.2 (a) be amended as follows:

"those observances follow rules *made by the particular institution concerned.*"

Motivation

We are concerned about the vagueness of the phrase "rules made by an appropriate authority" and submit that the authority should be defined as the governing body of the state or state-aided institution.

Clause 27.1 (f): Children [page 9]

Recommendation

We recommend that Clause 27.1 (f) be reviewed.

Motivation

The non-detention of juveniles has led to them becoming professional criminals or being used by adult criminals, because they are unlikely to be detained. It leads to increased criminal activity.

[Note: page numbers above refer to the page numbers in the Working Draft of the New Constitution dated 22 November 1995.]



Our reference: 3/3/2

5 February 1996

Mr C Ramaphosa
Chairperson of the Constitutional Assembly
P O Box 15
CAPE TOWN
8000

Dear Mr Ramaphosa

CONSTITUTIONAL AMENDMENT: LOTTERIES AND GAMBLING

Upon my appointment as Minister for General Services, the President of the Republic, Mr Nelson Mandela, in terms of section 91 of the Constitution of the Republic of South Africa Act 200 of 1993 on 15 March 1995 assigned the administration of the provisions of the Gambling Act 51 of 1965 as well as the Lotteries and Gambling Board Act 210 of 1993 to me under President's Minute Number 44 of 1995.

In this capacity, I have received three extensive reports from the Lotteries and Gambling Board ("the Board" hereafter) established under determination of a national policy with regard to the administration and management of Gambling. Cabinet after extensive deliberation resolved that a Lotteries Bill which *inter alia* provides for the establishment of a national lottery will soon be introduced in Parliament. It is against this background that I wish to submit a proposal for an amendment to Schedule 6 of the Constitution of the Republic of South Africa 200 of 1993 to be considered in respect of the current constitutional processes.

Section 126 of the Constitution *inter alia* provides that "[a] provincial legislature shall have concurrent competence with Parliament to make laws for the province with regard to all matters which fall within the functional areas specified in Schedule 6." [of the Constitution]. The second item in Schedule 6 refers to "Casinos, racing, gambling and wagering". I wish to propose that this be amended in the applicable schedule of the new constitutional text to read "Casinos, racing, gambling and wagering, excluding lotteries and sports pools".

MINISTERIE VIR ALGEMENE DIENSTE • MINISTRY FOR GENERAL SERVICES • ISA LUNA TA DIIRILOKAKAKELISO • ISIKHULULA SIKANGQONGQOSHU • WELZEMISEBENZI JIKLELE

Gambling in general, including lotteries, was the subject of the Board's investigation. It concluded in its Interim report of October 1994 at paragraph 3.0 [c] on page 9 that "[a] national state lottery should be owned and controlled by *central* Government." Government has the authority to legislate on lotteries and gambling in South Africa while Schedule 6 to the Constitution of the Republic of South Africa, 1993, (Act 200 of 1993), *excludes lotteries from the legislative competencies of the Provinces.*" In its Main report of March 1995 on page 64 it argued that "[l]egislative competency with regard to lotteries is vested in *central* government.", (own emphasis in all three above quotes).

Sports pools represent a specific type of lottery and it is submitted that the same arguments advanced in respect of lotteries applies to sports pools as well.

I also attach a copy of a legal opinion on this matter provided by the State Law Advisers. They conclude that " ... if the Legislature had intended to confer on the provincial legislatures legislative competence with regard to lotteries it would have done so expressly." They also refer to an opinion supplied to the North-West province by senior counsel which agrees with this conclusion.

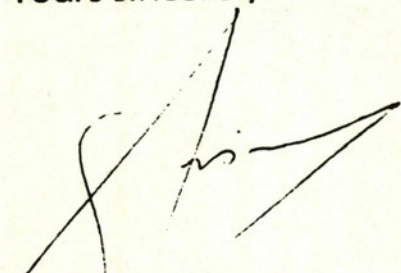
Section 156(1B) of the Constitution makes special provision for lotteries next to casinos, gambling and other games of chance. It can therefore be argued that had the Legislature intended to include lotteries in Schedule 6, it would expressly have stated so, as is the case in section 156(1B).

I would therefore argue that in order any possible ambiguity, it is desirable to expressly state the specific exclusion of lotteries and sports pools from the item in question. This in no way create an untenable position, as other items of Schedule 6 have specific exclusions, such as education, local government and nature conservation.

From my point of view as responsible Minister, I would concur with the State Law Adviser's conclusion. It is clear to me from experience I have gained in last 18 months that lotteries and gambling are two very different concepts albeit that both are games dependent *inter alia* on chance. In this regard, I wish to draw your attention to the distinction between "gaming" and "gambling". The latter is, together with lotteries and other games of chance, included in the former. The word "gaming" is however not included in Schedule 6. Cabinet has furthermore indicated its acceptance that lotteries form part of the responsibility of the national Government as well as its desire that it be treated as such. The Lotteries Bill soon to be introduced is indicative of this.

I should therefore be much obliged if you could cause my proposal to be circulated to all interested parties in the constitutional process. If further elucidation on any of the above points is required, I would be happy to be of assistance.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Chris Fisser', written in a cursive style.

**CHRIS FISMER MP
MINISTER**

5feb96

DDW

**LEGISLATIVE COMPETENCE OF PROVINCES IN RELATION TO LOTTERIES:
YOUR 8/6/STRAF/1/13 (DDW) DATED 23 DECEMBER 1994**

The State Law Advisers remark as follows.

1. Section 126(1), read with Schedule 6, of the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), hereinafter referred to as "the Constitution", provides that a provincial legislature shall be competent to make laws for the province with regard to, *inter alia*, "(c)asinos, racing, gambling and wagering". The Lotteries and Gambling Board, established by section 2 of the Lotteries and Gambling Board Act, 1993 (Act No. 210 of 1993), is, according to the submission, "aware of the distinction, recognised worldwide, as well as in the submissions to the Board, between lotteries and gambling". The members of the said Board are therefore of the opinion that "by virtue of its sovereignty, Government has the authority to legislate on lotteries and gambling in South Africa while Schedule 6 to the Constitution ... excludes lotteries from the legislative competencies of the Provinces". It appears from the submission that the provinces have some doubt about the correctness of the afore-mentioned viewpoint. The North-West Province subsequently briefed senior council to advise whether provinces have any legislative competence in respect of lotteries. Our opinion on the matter and the said legal opinion is requested.

2. In his opinion the senior council, *inter alia*, pointed out that at the promulgation of the Constitution the Legislature must have been aware of the existing legislation such as the Gambling Act, 1965 (Act No. 51 of 1965), which deals separately with gambling games and lotteries. He concludes therefore that "had it been the intention to confer powers upon provincial legislatures in respect of gambling as well as lotteries, that Parliament would have done so expressly". A development which could be seen as having complicated the matter was, according to the senior council, the insertion of subsection (1B) in section 156 of the Constitution, which subsection

provides as follows:

"(1B) A provincial legislature shall notwithstanding subsection (1) have exclusive competence within its province to impose taxes, levies and duties ... on -

- (a) casinos;
- (b) gambling, wagering and lotteries; and
- (b) betting."

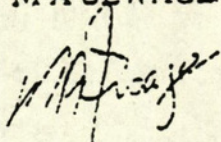
The senior council concerned points out that section 156(1B) of the Constitution authorizes the provincial legislature to impose taxes, levies and duties on, *inter alia*, lotteries and has nothing to do with the legislative competence granted to a provincial legislature in terms of section 126 of the Constitution. The powers conferred in these two sections should therefore not be confused with each other. According to the senior council this point is emphasized by the fact that section 156(1B) of the Constitution does not cover all the possibilities expounded in Schedule 6 thereof, for example a provincial legislature is competent to legislate on "racing" but is not empowered to impose taxes etc in respect of "racing". The senior council, therefore, concludes that provincial legislatures are "not competent to make any laws other than laws imposing taxes, levies or duties and providing for mechanisms enforcing such taxes, levies or duties, on or in relation to lotteries".

3. In our opinion the arguments expounded by the senior council in his opinion are sound and we are, therefore, in agreement that the provinces do not have legislative competence in respect of lotteries. To further substantiate this opinion we must point out that it is not only in the Gambling Act, 1965, that a distinction is made between gambling games and lotteries but that such distinction has been made from ancient times. It appears that the first public lottery to be recorded in England was in 1569 (Jarlath Finney, Gaming, Lotteries, Fundraising and the Law, 1982, at pp 5-9). It would seem that the first Proclamation with regard to gaming was in 1363 followed by a Statute in 1388, the Unlawful Games Act in 1541 and subsequently various Gaming Acts (see in general Chenery, The Law and Practice of Bookmaking, Betting, Gaming and

Lotteries, 1963; *Finney op cit* at pp 1-5; Halsbury's Statutes of England and Wales, Fourth Edition, 1993, Volume 5). It seems that the first Lottery Act was passed in 1698 (see Wharton's Law Lexicon, Thirteenth Edition, 1925 at p 386). Bearing the history of gambling and lotteries in mind and the fact that much of our law in this respect is based on English models and precedents as well as the fact that the concepts concerned are defined separately in the Gambling Act, 1965, it can be presumed that at the promulgation of the Constitution in 1993 the Legislature was aware of the distinction that has always been made between lotteries and gambling (see Steyn, Die Uitleg van Wette, Vyfde Uitgawe, 1981 at p. 132 ; Young & Co v Mayor of Royal Leamington Spa, (1883) vol. 8 App. Cas. 517 at 526 and Ex Parte County Council of Kent and Council of Dover (1891) 1 Q.B. 725 at 728). Therefore we are of the opinion that if the Legislature had intended to confer on the provincial legislatures legislative competence with regard to lotteries it could have done so expressly.

A. W. OLWAGE

DIRECTOR-GENERAL: JUSTICE
M A OLWAGE/G J VAN ZYL/1995-01-04



Muslim World League

SOUTH AFRICA

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ
وَاعْتَصِمُوا بِحَبْلِ اللَّهِ جَمِيعًا وَلَا تَفَرَّقُوا

رابطة العالم الإسلامي

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Extension 19
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01 FEBRUARY 1996

REF.:
AAS/DL/CA/SA/2

The Executive Director
Constitutional Assembly
PO Box 1192
CAPE TOWN
8000

Dear Sir

**RE: COMMENTS ON SECTION 14 (3) OF CHAPTER 2 OF THE WORKING DRAFT OF
THE NEW CONSTITUTION**

1. Section 14 (3) in effect provides that the state may pass legislation recognizing a system of personal and family law of a religious group "to the extent that the system is consistent with the Bill of rights".
2. The requirements that the system of personal law must be subject to the bill of rights amounts to a gross violation of religious freedom itself.
3. The requirement must be deleted and the freedom of religion clause must be given overriding effect in order to avoid a conflict with other fundamental rights.

Yours faithfully

.....
Dr. A.A. Sarhan
(Director)

DIRECT ALL CORRESPONDENCE
TO OUR NEW POSTAL ADDRESS
WHICH IS SET FOLLOWS.

MUSLIM WORLD LEAGUE (RABITA)
P.O. BOX 42714
FORDSBURG 2033
GAUTENG, SOUTH AFRICA

S.A. FEDERATION FOR
MENTAL HEALTH

Formerly National Council for Mental Health

Our Ref.: 8.6

Your Ref.:

31 January 1996

The Executive Director
Constitutional Assembly
P.O. Box 1192
CAPE TOWN
8000

Sir,

Bill of Rights: Persons with Mental Illness and Persons with
Mental Handicap

In South Africa there are approximately 40 000 persons with a severe mental illness and approximately 120 000 people with a severe mental handicap (mental age below 8 years).

This Federation applauds the rights given these people by implication in the draft constitution and agrees that in principle people should have to approach the courts if they require the rights of a person with an intellectual or psychiatric disability to be limited. This is probably unique for any country.

It is going to lead to a situation, however, where mental health professionals will refuse to treat persons who are a danger to themselves and to others because of the expense and red tape associated with court action.

Whereas we are all in favour of protecting the rights of people with mental illness and mental handicap, we are of the opinion that provision must be made for administrative action in cases of urgency, where people are in a real danger of causing physical or financial harm to themselves and others. At the same time such administrative action must have safeguards to prevent exploitation. Under the present legislation it has been possible to lock away mentally ill people for decades. That must never happen again.

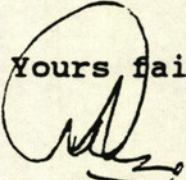
Section 33 of the Interim Constitution is admittedly too wide and actually negates the Bill of Rights, but could be a practicable solution if supervised by the Public Protector provided for in Section 107 of the Draft Constitution.

"We actively work with the community to achieve the highest possible level of mental health for all."

FR: 01 100200 000 4

People with mental illness and mental handicap often do not have the ability or legal capacity to act or speak for themselves. The potential to exploit them is therefore immense. Unlike children, however, their vulnerability is not specially catered for. It is therefore important that the Public Protector should not only have the power and capacity to investigate complaints, but that he should act proactively to ensure that persons with mental illness or mental handicap enjoy the human rights they are entitled to. This implies a national register of persons with a severe intellectual or psychiatric disability so that the conditions under which they are cared for are monitored.

Yours faithfully



LAGE VITUS
NATIONAL EXECUTIVE DIRECTOR

LV080609. DOX



B.1.1

CONSTITUTIONAL ASSEMBLY

9 February 1996

Chairperson
Society of the Abolition
of the Death Penalty
P O Box 5227
CAPE TOWN
8000

Dear Mr Kerfoot

Thank you for your submission dated 8 February 1996.

It will be presented to the Constitutional Committee for its consideration. Until the Committee has had the opportunity to consider the submission, I am not in a position to accede to your request to make an oral submission.

Yours faithfully


HASSEN EBRAHIM
EXECUTIVE DIRECTOR

P. O. Box 15, Cape Town, 8000
Republic Of South Africa

Tel: (021) 245 031, 403 2252 Fax: (021) 241 160/1/2/3, 461 4487. E-mail: conassem@iaccess.za



You've made your mark



Now have your say

THE NEW CONSTITUTION

**SOCIETY FOR THE ABOLITION OF THE DEATH PENALTY
IN SOUTH AFRICA**

Cape Town Chapter

P.O. Box 5227, CAPE TOWN 8000

FAX (021) 230935
Phone: 238285

8 February 1996

Mr Hassan Ebrahim
The Executive Director
Constitutional Assembly
CAPE TOWN

PER FAX: 241162

Dear Sir,

I am sending with this fax the submissions by the Society For the Abolition of the Death Penalty on paragraph 6 of the working draft of the Constitutional Assembly.

I respectfully ask that the Society be able to present their submissions before the Constitutional Assembly on 18, 19 or 20 February 1996.

I look forward to hearing from you.

Yours faithfully,


W R KERFOOT
Chairperson

**SOCIETY FOR THE ABOLITION OF THE DEATH PENALTY
IN SOUTH AFRICA**

Cape Town Chapter

P.O. Box 5227, CAPE TOWN 8000

FAX (021) 230935
Phone: 238285

8 February 1996

The Executive Director
Constitutional Assembly
CAPE TOWN

ATT: Mr H Ebrahim
PER FAX: 241162

Dear Sir,

The Society for the Abolition of the Death Penalty in South Africa (Western Cape Chapter) respectfully makes the following submissions on paragraph 6 of the Bill of Rights options :-

- 1) We urge the adoption of Option 1 and emphatically reject the alternative option.
- 2) Option 1 is in compliance with the constitutional principles set out in Schedule 4 to the interim Constitution which are also applicable to the final Constitution. It also complies with the principles of interpretation set out in Section 36 of the draft Constitution.
- 3) Most importantly, it does not undermine the principles set out by the Constitutional Court in the case of Themba Makwanyane and Mvuso Mchunu v The State as does Option 2.
- 4) As Professor Hugh Corder has convincingly argued, Parliament should be reluctant to change the wording of the Constitution as pronounced upon by the Constitutional Court because such amendments inevitably undermine the authority and safeguards of the Constitution.
- 5) It is in the interests of certainty of and respect for the final Constitution that the provisions of its Bill of Rights consonant with the new Constitutional Order remain as similar as possible to those of the interim Constitution.

- 6) It is submitted that the alternative option to the present right to life clause amounts to an effort to subvert the Constitutional Court and the Constitution itself both of which have earned enormous respect through their objective focus on rights independently of political interests.
- 7) At best for the argument that the death penalty should be included in the Constitution, it seems to be premised on the belief that the public wants the death penalty on the one hand and that on the other it is needed to combat violent crime.
- 8) Both these premises are fallacious.
- 9) There is not a shred of evidence that the death penalty is a deterrent. There is, however, overwhelming evidence that the most effective deterrent to violent crime is the probability of arrest, conviction and sentence. We annex statistics on the murder rate in the United States which indicate that in 1994 the murder rate in death penalty states was approximately double that of non death penalty states.
- 10) Moreover, to quote Professor Devenish, the death penalty "creates an erroneous impression that effective measures are indeed being adopted to counteract crime, and very often the fundamental socio economic issues giving rise to criminal conduct are not addressed and remedied."
- 11) "Only a new and just political and economic system that is designed to effectively redress the manifold socio economic and political wrongs and injustices of our society will be able to reduce the incidents of homicide in South Africa."
- 12) It is significant that the Commissioner of Police, Mr George Fivaz has accepted that the death penalty should remain abolished.
- 13) As far as the allegation about the public wanting the death penalty is concerned, no-matter how much the public desires the death penalty, if public opinion were to be decisive the Constitutional Court would not exist and Parliament could exercise sovereignty with a mandate from the public. However, a constitutional system is not governed by opinion poll and the final protector of the individual against society and the State is the Constitutional Court. In any event if the public wish is wrong it must be rejected. The Government cannot indulge a wish rooted in ignorance.
- 14) Various studies have shown that where members of the public are properly informed that there is no evidence that the death penalty is a deterrent and have other options explained to them, they abandon their support for the death penalty.

- 15) The present Bill of Rights has been immeasurably enriched by the sources it has been able to draw on from the US Constitution to the most recent post colonial Constitutions. It has also benefited from the commitment to freedom and democracy set out in Schedule 4 to the Act and in the postscript to the Constitution which provides as follows:

"this Constitution provides the historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex....."

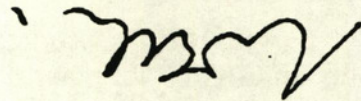
.....the adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles and violent conflicts and the legacy of hatred, fear, guilt and revenge.

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation"

- 16) The reintroduction of the death penalty would violate those principles.
- 17) Furthermore, it is submitted that the death penalty option is morally and logically irreconcilable with other specific sections of the Bill of Rights which will be retained in the final Constitution, particularly the right to equality, the right to dignity and the right to freedom from cruel, inhuman or degrading treatment or punishment.
- 18) With the stark exception of the United States, progress in democratic countries has reflected a continuing trend towards abolition of the death penalty.
- 19) A most experienced United States Supreme Court Justice has within the last two years publicly stated that the consistency and rationality required for the imposition of the death penalty are inversely related to the fairness owed the individual when considering the sentence of death. He accordingly refused to "tinker with the machinery of death" any longer.
- 20) The consistency and uniformity required for the imposition of the supreme penalty is also incompatible with the fact that not only do Courts differ on whether to convict someone on a capital crime but also markedly in whether

21

W R KERFOOT
Chairperson



Yours faithfully,

22) These dangers are vastly increased in a markedly heterogeneous society such as South Africa where language and cultural differences are significant and where there are enormous disparities in wealth and power.

21) Still more unacceptable is the fact that inevitably the death penalty tends to be carried out upon the most vulnerable members of society "the poor, the mentally disturbed and the members of racial, religious or ethnic minorities. Throughout the world it has applied disproportionately to the disadvantaged, and death sentences are imposed on people at the lower end of the social scale who would not have faced the death penalty if they had come from a more favoured section of society."

the death penalty should be imposed. It is unacceptable that the life of an accused should depend upon a lottery of which judge is allocated to a case.

DEATH PENALTY INFORMATION CENTER

FBI Uniform Crime Reports: Murder Rates per 100,000 population

	1994	1993	1992	1991
1. North Dakota*	0.2	1.7	1.8	1.1
2. Vermont*	1.0	2.6	2.1	2.1
3. New Hampshire	1.4	2.0	1.8	2.6
4. South Dakota	1.4	2.4	0.8	1.7
5. Iowa*	1.7	2.3	1.6	2.0
6. Maine*	2.8	1.6	1.7	1.2
7. Utah	2.8	3.1	3.0	2.9
8. Nebraska	3.1	3.9	4.2	3.3
9. Minnesota*	3.2	3.4	3.3	3.0
10. Montana	3.3	3.8	2.9	2.6
11. Wyoming	3.4	3.4	3.6	3.3
12. Idaho	3.5	2.9	3.5	1.8
13. Massachusetts*	4.1	3.9	3.6	4.2
14. Rhode Island*	4.2	3.8	3.8	3.7
15. Hawaii*	4.2	3.8	3.6	4.0
16. Wisconsin*	4.5	4.4	4.4	4.8
17. Delaware	4.7	5.0	4.6	5.4
18. Oregon	4.9	4.6	4.7	4.6
19. New Jersey	5.0	5.3	5.1	5.2
20. Colorado	5.4	5.8	6.2	5.9
21. West Virginia*	5.4	5.9	6.3	6.2
22. Washington	5.5	5.2	5.0	4.2
23. Kansas	5.8	6.4	6.0	6.1
24. Pennsylvania	5.9	6.8	6.2	6.3
25. Ohio	6.0	6.0	6.6	7.2
26. Alaska*	6.3	6.0	7.5	7.4
27. Kentucky	6.4	6.8	5.8	6.8
28. Connecticut	6.8	6.3	5.1	5.7
29. Oklahoma	6.9	8.4	6.5	7.2
30. Indiana	7.9	7.5	8.2	7.5
31. Florida	8.3	8.9	9.0	9.4
32. Virginia	8.7	8.3	8.8	8.3
33. Tennessee	9.3	10.2	10.4	11.0
34. South Carolina	9.8	10.3	10.4	11.3
35. Michigan*	9.8	9.6	9.9	10.8
36. Georgia	10.0	11.4	11.0	12.8
37. Arizona	10.8	8.6	8.1	7.8
38. Missouri	10.8	11.3	10.8	10.5
39. New Mexico	10.7	8.0	8.9	10.5
40. North Carolina	10.9	11.3	10.6	11.4
41. Texas	11.0	11.9	12.7	15.3
42. New York*	11.1	13.3	13.2	14.2
43. Maryland	11.6	12.7	12.1	11.7
44. Nevada	11.7	10.4	10.9	11.8
45. Illinois	11.7	11.4	11.4	11.3
46. California	11.8	12.1	12.7	12.7
47. Alabama	11.9	11.6	11.6	11.3
48. Arkansas	12.0	10.2	10.8	11.1
49. Mississippi	13.3	13.5	12.2	12.8
50. Louisiana	19.8	20.3	17.4	16.9
NATIONAL	8.6	9.6	8.9	9.8

*States without the death penalty

Average murder rate among states without the death penalty 4.6

Average murder rate among states with the death penalty 8.0 (1994)

Note: Averages calculated with NY as a non-death penalty state, though it adopted it in 1995.

From: "Welgens" <WELGENS@libarts.up.ac.za>
Organization: University of Pretoria
To: Conassem@iaccess.za
Date sent: Fri, 9 Feb 1996 11:23:50 GMT+2
Subject: Language Clauses
Send reply to: Welgens@Libarts.up.ac
Priority: normal

Dear Sir

A file containing the Submission on language clauses as reported in "Constitutional Talk" on behalf of the English Academy of Southern Africa is enclosed herewith by file attachment. Kindly extract onto a floppy disk. Hard copy posted.

Prof P J H Titlestad
Dept of English
University of Pretoria
0002

Fax no 012 4202698

Mrs Froukje Welgens
English Department
University of Pretoria Pretoria South Africa
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SUBMISSION BY P J H TITLESTAD ON BEHALF OF THE ENGLISH ACADEMY OF SOUTHERN AFRICA ON THE WORKING DRAFT OF THE REVISED CONSTITUTION AS REPORTED IN CONSTITUTIONAL TALK.

- 1 This submission concerns those clauses that have to do with language: in the Interim Constitution Clauses 3, 31 and 32, and in the Working Draft Clause 6, Languages Options 1, 2, 3 and Clause 30, Language and Culture.
- 2 Working Draft, Clause 6, Languages, Options 1, 2, 3
- 2.1 Option 1 is clearly the most satisfactory. Option 3 is too brief, leaving out some desirable detail. Option 2, the unaltered clauses of the interim constitution, retain the weak features of these clauses.
- 2.2 Option 1 retains the Pan South African Language Board (PanSALB), giving it constitutional status. It makes it possible for particular languages to be used for specific purposes at national and regional level and it contains the necessary proviso that usage, practicality and expense may be taken into account. In the extremely complex situation in South Africa some flexibility is desirable.
- 2.3 The weakness in the original section 3 of the interim constitution lies chiefly in the phrase "equal use and enjoyment" of 3(1) and 3(9)a. This is an unrealisable ideal, implying a totally impractical numerical concept which ignores the widely different numbers of speakers of different languages and ignores the question of language function: certain languages are used as linguae francae and not just by first-language or mother-tongue speakers. What is equal use and how is it to be defined? The only possible interpretation is that all should speak everything in the same amount, which is not the case now and can never be the case. Minority languages must, of course, be protected by having the status of official languages. There must be the eleven official languages, and they must be developed.
- 2.4 The retention of "practicality" does admittedly qualify the concept of rights and this has occasioned some thought on the part of the submitters of this opinion, but we have concluded that this qualification is inevitable. The difficulties and even damage consequent on its omission would be greater than those resulting from its inclusion.
- 2.5 As stated above, there must be the eleven official languages, and they must be developed. But, as also stated above, the language clauses must permit those languages that have a wider function, to perform that function. This is the crucial aspect of language planning which is not always considered by sociolinguists.
- 2.5.1 In this regard, a word about the peculiar position of English is apposite. English has a set of functions that no other language in South Africa performs to quite the same extent. It is to the general benefit of South Africa that English continues to perform these functions. The constitution itself could hardly have been negotiated without the use of English. The great majority of the books in our significant libraries are in English, a resource that can probably never be replaced, and a resource which should be available to as many South Africans as possible. English is our window on the outside world and our chief (and essential) language of tertiary education. It is an important general lingua franca.
- 2.5.2 At the same time, English is under attack as a danger to other languages because of its power. For example, the PanSALB Green Paper used the term "linguicism" (intended as a parallel to the term racism) to describe the danger of a kind of language imperialism.

Another image that is sometimes used is that of an "ecological hazard", the language that like a powerful plant tends to outgrow and overwhelm neighbouring growth. These are ideas that have some truth in them but which can also do immense damage to South Africa if rigorously and blindly promoted and backed by an unwisely framed constitution.

2.5.3 It was this problem that the NEPI (National Education Policy Investigation) Framework Report wrestled with when it spoke (p.182) of "ensuring that all South Africans have access to English (because it is currently the language of access to further education, and because it is an established lingua franca in South Africa and further afield), without jeopardizing the use of African languages."

2.6 Therefore, the language clauses of the constitution must leave room for flexibility, hence such phrases as "equal use" must be avoided. The English Academy of Southern Africa ~~is aware that the above~~ arguments might be attributed to self-interest or to sectional interest but feels that open discussion is needed. A firm statement about the function of English is essential. Obviously the English-speaking section of the population is in a position of linguistic privilege and one hopes that education in the future will promote a sense of the necessity to be multi-lingual.

3. Working Draft clause 30: Interim Constitution 31 and 32

Language & Culture
 It is proposed here that the original clauses 31 and 32 of the interim constitution be retained. The suggested redraft which conflates and condenses them into the single, brief Working Draft clause 30, is so wide as not to adequately confer rights or protect rights. The detail and specificity of the original clauses 31 and 32 is highly desirable. These clauses do contain the necessary qualification forbidding their racist application, while giving groups and cultures the protection that is rightly theirs, and which any decent society should allow and any adequate constitution should guarantee.

P J H TITLESTAD

